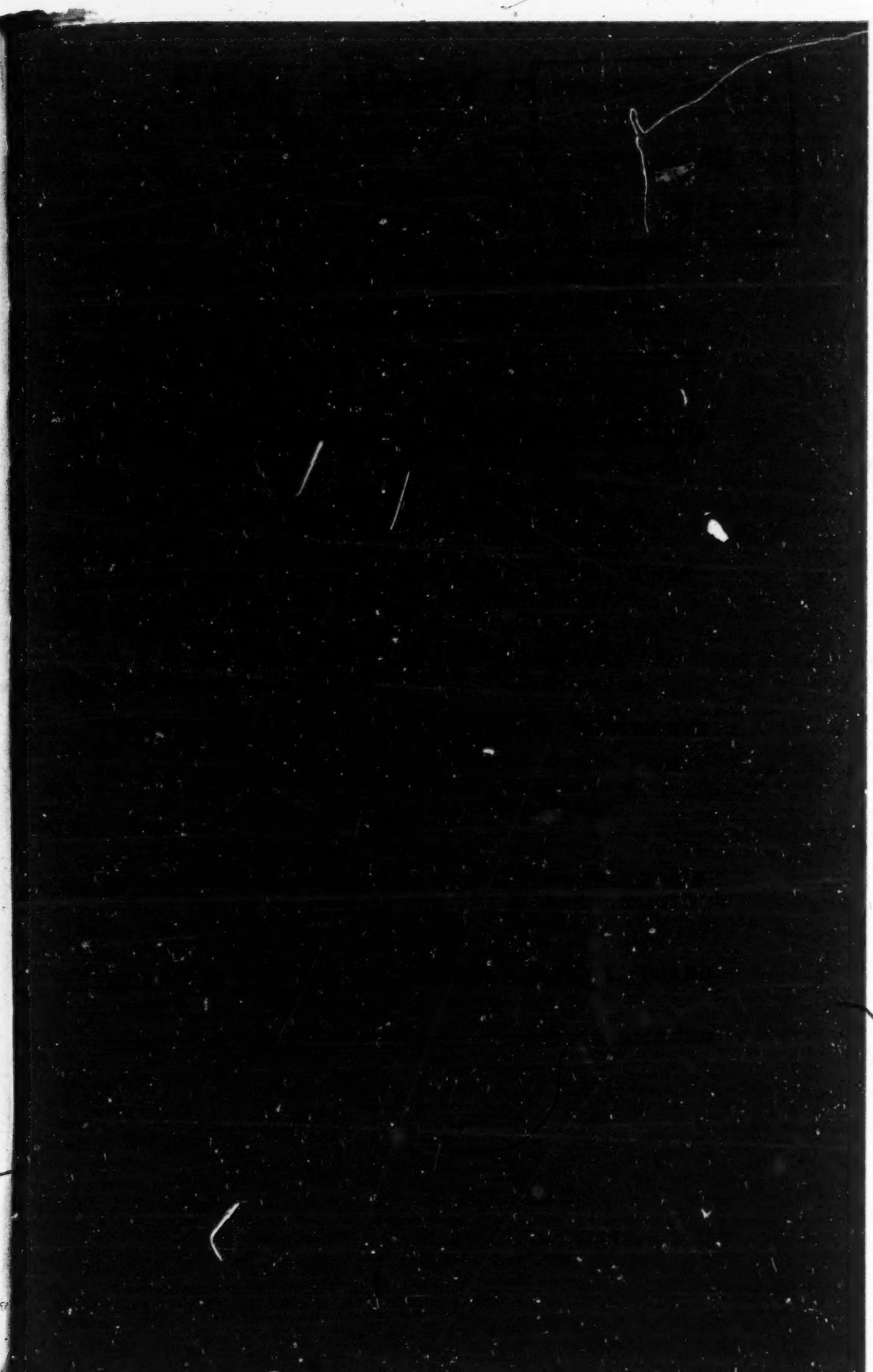


INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	3
Summary of argument	10
Argument:	
I. The Board's finding that a unit consisting of the employees at the Company's six flat-glass plants is appropriate for purposes of collective bargaining is supported by substantial evidence	13
A. The issue	13
B. There is abundant evidence to support the determination of the Board	17
1. The greater effectiveness of employee bargaining through a division-wide representative	18
2. The common interests of the employees throughout the flat-glass division	22
3. The desires of a large majority of all the employees in the flat-glass division for the unit found by the Board	23
4. The history of collective bargaining in the flat-glass division	24
C. The Board was not required to give conclusive weight to the asserted preference of the Crystal City employees	29
1. The preference would not be determinative even if freely given	29
2. The preference of the Crystal City employees was not freely given	32
II. The Board correctly excluded evidence offered at the hearing and the court below properly denied the petitions to adduce such evidence	38
1. Company domination and interference	39
2. The desires of the Crystal City employees	40
3. The separate interests of the Crystal City employees	41
III. The Act does not improperly delegate legislative power, and the Board fairly applied its standards	44
Conclusion	46
Appendix	47

290637—41——1

CITATIONS

Cases: Page

American Federation of Labor v. *National Labor Relations Board*, 308 U. S. 401 ..... 41, 43
Association of C. E. of A., T. & S. F. Ry. System v. *Brotherhood of Ry. and S. S. Clerks*, 85 F. (2d) 152 (C. C. A. 7) .. 16
Bethlehem Shipbuilding Corp. v. *National Labor Relations Board*, 114 F. (2d) 930 (C. C. A. 1) 34, 35
Brotherhood of Railway Trainmen v. *National Mediation Board*, 88 F. (2d) 757 (App. D. C.) 16
Bussmann Mfg. Co. v. *National Labor Relations Board*, 111 F. (2d) 783 (C. C. A. 8) 16
Clover Fork Coal Co. v. *National Labor Relations Board*, 97 F. (2d) 331 (C. C. A. 6) 40
Consolidated Edison Co. v. *National Labor Relations Board* 305 U. S. 197 35
Cox v. *Hart*, 145 U. S. 376 42
Federal Trade Commission v. *R. F. Keppel & Bro.*, 291 U. S. 304 17
Fidelity & Deposit Co. v. *Bucki & Son Lumber Co.*, 189 U. S. 135 42
Franklin v. *South Carolina*, 218 U. S. 161 42
H. J. Heinz Co. v. *National Labor Relations Board*, No. 73, this Term, decided January 6, 1941 ..... 35, 37
Hughes, Inc. v. *Federal Trade Commission*, 77 F. (2d) 886 (C. C. A. 2), certiorari denied, 296 U. S. 617 42
International Association of Machinists v. *National Labor Relations Board*, 110 F. (2d) 29 (App. D. C.), affirmed, 311 U. S. 72 ..... 16, 18, 21, 23, 31
Marlin-Rockwell Corp. v. *National Labor Relations Board*, January 6, 1941 (C. C. A. 2d) 16
Matter of Alpena Garment Co., 13 N. L. R. B. 720 21
Matter of American Hardware Corp., 4 N. L. R. B. 412 20
Matter of American Steel Wire Co., 5 N. L. R. B. 871 24
Matter of American Woolen Co., 5 N. L. R. B. 144 20
Matter of Art Crayon Co., Inc., 7 N. L. R. B. 102 21
Matter of Bloedel-Donovan Lumber Mills, 8 N. L. R. B. 230 .. 24
Matter of Boorum and Pease Co., 7 N. L. R. B. 486 23
Matter of Coos Bay Logging Co., 13 N. L. R. B. 950 21
Matter of Fisher Body Corp., 7 N. L. R. B. 1083 21
Matter of Globe Machine & Stamping Co., 3 N. L. R. B. 294 .. 31
Matter of Inland Steel Co., 9 N. L. R. B. 783 21
Matter of Kling Factories, 8 N. L. R. B. 1228 24
Matter of Libbey-Owens-Ford Glass Co., 10 N. L. R. B. 1470 .. 21, 24
Matter of Marcus Loew Booking Agency, 3 N. L. R. B. 380 ... 23
Matter of Miadle West Corp., 10 N. L. R. B. 618 21

Cases—Continued. Page

Matter of Monon Stone Co., 10 N. L. R. B. 64 24
Matter of Naumkeag Steam Cotton Co., 13 N. L. R. B. 513 21
Matter of Nekoosa-Edwards Paper Co., 11 N. L. R. B. 446 ..... 21, 23, 24
Matter of Phelps-Dodge Corp., United Verde Branch, 6 N. L. R. B. 624 23
Matter of Postal Telegraph-Cable Corp. of N. Y., 9 N. L. R. B. 1060 21
Matter of Remington Rand, Inc., 2 N. L. R. B. 626 24
Matter of Rossie Velvet Co., 3 N. L. R. B. 804 20
Matter of Royal Warehouse Corp., 8 N. L. R. B. 1218 21
Matter of Shell Oil Co. of California, 2 N. L. R. B. 835 24
Matter of Snoqualmie Falls Lumber Co., 10 N. L. R. B. 398 24
Matter of Standard Oil Co. of California, 5 N. L. R. B. 750 21
Matter of Tennessee Electric Power Co., 7 N. L. R. B. 24 21
Matter of Todd Shipyards Corp., 5 N. L. R. B. 20 20
Matter of United Shipyards, Inc., 5 N. L. R. B. 742 20
Matter of Waggoner Refining Co., Inc., et al., 6 N. L. R. B. 731 21
McQuay-Norris Mfg. Co. v. *National Labor Relations Board*, decided December 23, 1940 (C. C. A. 7) 17
Nashville, C. & St. L. Ry. v. *Ry. Employees' Dept.*, 93 F. (2d) 340 (C. C. A. 6), certiorari denied, 303 U. S. 649 16
National Labor Relations Board v. *Biles-Coleman Lumber Co.*, 98 F. (2d) 18 (C. C. A. 9) 23
National Labor Relations Board v. *Brown Paper Mill Co.*, 108 F. (2d) 867 (C. C. A. 5), certiorari denied, 310 U. S. 651 35
National Labor Relations Board v. *Carlisle Lumber Co.*, 94 F. (2d) 138 (C. C. A. 9), certiorari denied, 304 U. S. 575 16
National Labor Relations Board v. *Christian Board of Publication*, 113 F. (2d) 678 (C. C. A. 8) 34
National Labor Relations Board v. *Dahlstrom Metallic Door Co.*, 112 F. (2d) 756 (C. C. A. 2) 40
National Labor Relations Board v. *Falk Corp.*, 308 U. S. 453 ..... 33, 35, 38, 43
National Labor Relations Board v. *J. Freezer & Son, Inc.*, 95 F. (2d) 840 (C. C. A. 4) 34
National Labor Relations Board v. *Ed. Friedrich, Inc.*, decided January 4, 1941 (C. C. A. 5) 34, 40
National Labor Relations Board v. *Link-Belt Co.*, Nos. 235, 236, this Term, decided January 6, 1941 ..... 16, 17, 35
National Labor Relations Board v. *Lund*, 103 F. (2d) 815 (C. C. A. 8) 16, 21
National Labor Relations Board v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333 41
National Labor Relations Board v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241 ..... 35, 36
National Labor Relations Board v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272 35

Cases—Continued. Page

National Labor Relations Board v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261 ..... 16, 34

National Labor Relations Board v. *Piqua Munising Wood Products Co.*, 109 F. (2d) 552 (C. C. A. 6) 16

National Labor Relations Board v. *Pittsburgh Plate Glass Co.*, 102 F. (2d) 1004 (C. C. A. 8) 33

National Labor Relations Board v. *Remington Rand, Inc.*, 94 F. (2d) 862 (C. C. A. 2), certiorari denied, 304 U. S. 576 ..... 17, 34

National Labor Relations Board v. *Stackpole Carbon Co.*, 105 F. (2d) 167 (C. C. A. 3), certiorari denied, 308 U. S. 605 34

National Labor Relations Board v. *Somerset Shoe Co.*, 111 F. (2d) 681 (C. C. A. 1) 16

National Labor Relations Board v. *Sunshine Mining Co.*, 110 F. (2d) 780 (C. C. A. 9), certiorari denied, No. 352, this Term 16

National Labor Relations Board v. *Wallace Mfg. Co., Inc.*, 95 F. (2d) 818 (C. C. A. 4) 34

National Labor Relations Board v. *Waterman Steamship Corp.*, 309 U. S. 206 16

National Labor Relations Board v. *Whittier Mills Co.*, 111 F. (2d) 474 (C. C. A. 5) 17

National Licorice Co. v. *National Labor Relations Board*, 309 U. S. 350 ..... 18, 34

Norwegian Nitrogen Products Co. v. *United States*, 288 U. S. 294 15

Philadelphia & Trenton R. Co. v. *Stimpson*, 14 Pet. 448 42

Republic Steel Corp. v. *National Labor Relations Board*, 107 F. (2d) 472 (C. C. A. 3), modified, 311 U. S. 7 ..... 34, 35

Solvay Process Co. v. *National Labor Relations Board*, decided January 4, 1941 (C. C. A. 5) 34

United States Navigation Co. v. *Cunard S. S. Co.*, 284 U. S. 474 17

Westinghouse Electric & Mfg. Co. v. *National Labor Relations Board*, 112 F. (2d) 657 (C. C. A. 2), certiorari granted, No. 447, this Term, November 12, 1940 35

Wilson & Co., Inc. v. *National Labor Relations Board*, 103 F. (2d) 243 (C. C. A. 8) 40

Statute:

National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Supp. V, Sec. 151, *et seq.*):

Sec. 8 47

Sec. 9 ..... 14, 15, 18, 30, 44, 47

Sec. 10 ..... 43, 44

Miscellaneous:

Commission of Inquiry, Interchurch World Movement, Report on the Steel Strike of 1919 (1920) 20

Miscellaneous—Continued. Page

Commons, Labor and Administration (1913) 20
Douglas, Wage Theory and Wage Policy, in International Labour Review (I. L. O., Geneva, March 1939) 21
First Annual Report of the National Labor Relations Board (1936) 15
Fourth Annual Report of the National Labor Relations Board (1939) 15
House Rpt. No. 1147, 74th Cong., 1st Sess. 30
House Rpt. No. 3109, Pt. 1, 76th Cong., 3d Sess. 15
House Rpt. No. 1902, Pt. 2, 76th Cong., 3d Sess. 15
Jenks and Clark, The Trust Problem (1917) 20
Kier, Labor's Search for More (1937) 20
Second Annual Report of the National Labor Relations Board (1937) 15
Senate Rpt. No. 573, 74th Cong., 1st Sess., p. 3 18
Third Annual Report of the National Labor Relations Board (1938) 15
U. S. Industrial Commission, Preliminary Report on Trusts and Industrial Combinations, Vol. I, Review of Evidence 20

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 521

PITTSBURGH PLATE GLASS COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

No. 523

CRYSTAL CITY GLASS WORKERS' UNION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. 545–552) is reported in 113 F. (2d) 698. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 430–452) are reported in 15 N. L. R. B. 515.

JURISDICTION

The decree of the court below (R. 552–553) was entered on July 23, 1940. Petitions for rehearing (R. 553–567, 568–571) were denied on August 12, 1940 (R. 571–572). Separate petitions for certiorari were filed by the Company and by the Crystal City Union on October 23 and October 25, 1940, respectively, and were granted on December 9, 1940. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and upon Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the Board's determination of the unit appropriate for collective bargaining is supported by substantial evidence.

2. Whether the Board erred in excluding certain evidence offered by each petitioner, and whether the court below erred in denying their petitions to adduce such evidence.

3. Whether Section 9 (b) of the Act represents an unconstitutional delegation of legislative power to the Board.[1]

---

[1] The first and second questions are raised in both petitions; the third question is raised only by the Company (Pet. 5) but is not argued in its brief on the merits (Br. 48; see pp. 44–45, *infra*).

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Supp. V, Sec. 151, *et seq.*) are set forth in the Appendix.

STATEMENT

The present case arises on review of an order requiring the Pittsburgh Plate Glass Company to cease and desist from unfair labor practices and to bargain collectively with the Federation of Flat Glass Workers of America. The order was issued in the last of three proceedings before the Board involving the Company and the Federation.

The first of these proceedings was initiated on June 17, 1938, against the Company pursuant to Section 10 of the Act, the Board's complaint (see R. 344) alleging that the Company had dominated and interfered with the Crystal City Union in violation of Section 8 (1) and (2). Before any evidence was adduced, counsel for the Board and the Company entered into a stipulation (R. 345–349) providing that the Board might enter an order requiring the Company to cease and desist from "in any manner dominating or interfering with the administration of the Crystal City Glass Workers Union * * * or contributing aid or support to said organization * * * [and] from recognizing or dealing with the Crystal City Glass Workers Unions as a labor organization." In this stipulation the Company consented (R. 349)

to entry of an appropriate court decree enforcing the order of the Board. On September 22, 1938, the Board issued a decision and order in accordance with the stipulation (R. 343–352) and on January 14, 1939, the Circuit Court of Appeals for the Eighth Circuit entered a decree enforcing the order (102 F. (2d) 1004).

The second proceeding, initiated by a petition and amended petition of the Federation (R. 354A–354B), was a representation proceeding under Section 9 of the Act, in which the Board on May 26, 1938 ordered an investigation of questions concerning the representation of employees at certain of the Company's plants (R. 355–356). A hearing was held before a trial examiner at which both the Company and the Crystal City Union were afforded full opportunity to adduce evidence relevant to the question of representation, except that no evidence was received with respect to matters concluded by the prior decision and order of the Board. The Company, the Federation and the Crystal City Union filed briefs with the Board and the Company and the Federation participated in oral argument before the Board (R. 45, 365–366). Upon these proceedings, the Board on January 13, 1939, issued its decision and certification of representatives (R. 42–56). The Board found that the production and maintenance employees (with minor exceptions) of the Company at its six flat glass plants constitute a unit appropriate

for collective bargaining, within the meaning of Section 9 (b) of the Act, and certified the Federation as the exclusive representative of all employees in such unit.

In the third proceeding, upon a charge filed by the Federation (R. 38A), the Board on February 20, 1939, issued a complaint (R. 34–37) against the Company alleging that it had, in violation of Section 8 (1) and (5) of the Act, refused to bargain collectively with the Federation as the exclusive representative of the employees in the unit found by the Board to be appropriate. In its answer (R. 40–42) the Company admitted the refusal to bargain but denied, upon the ground that the Board's prior certification was arbitrary and invalid, that such refusal violated the Act. The Crystal City Union intervened (R. 20), and participated in the hearing before a trial examiner. Thereafter, the examiner issued an intermediate report, to which the Company and the Crystal City Union filed exceptions (R. 368–410, 411–425), briefs were filed, and oral argument was had before the Board (R. 429). Upon these proceedings, the Board on September 19, 1939, issued its findings of fact, conclusions of law, and order (R. 430–452).

The facts, as found by the Board and as shown by the evidence, may be summarized as follows:[2]

---

[2] The following statement necessarily covers the findings in both the representation proceeding and the unfair labor practice case (see Section 9 (d)). The references preceding

The Company's extensive operations in manufacturing and selling various types of industrial products are separated into five main divisions (R. 45, 436; 359–362); one of these, the flat glass division, with which this case is concerned, comprises six plants located in five States, viz, Ford City, Pennsylvania; Creighton, Pennsylvania; Mt. Vernon, Ohio; Clarksburg, West Virginia; Henryetta, Oklahoma; and Crystal City, Missouri (R. 45–47, 436–437; 360–362).[3] The flat glass division is operated "quite separately" from the Company's other main divisions, and has its own labor policies, determined in the Pittsburgh central office for all six plants (R. 48; 74–75, 97–98, 109–111, 114, 127–128, 122–124, 235, 240). Wages, hours, and working conditions—the normal objects of collective bargaining—are substantially similar at all of these plants; so, too, are the manufacturing processes and the labor skills required (R. 53, 443; 82–84, 96–97, 115, 122–124, 142, 202–203, 235–236).

The Federation, formed in 1933, sought from the beginning to organize and to bargain for the

---

the semicolons are to the Board's findings and the succeeding references are to the supporting evidence or stipulation of the parties.

[3] The number of employees at each plant is as follows (R. 46): Creighton, 2,236; Ford City, 1,672; Crystal City, 1,607; Henryetta, 273; Mt. Vernon, 350; Clarksburg, 353. Two other plants, while grouped in the flat glass division, produce different products (R. 128); no party objected to excluding them from consideration with the flat glass plants (R. 47, 48–49). For purposes of brevity we shall describe the six plants as constituting the flat glass division.

production and maintenance employees at all six glass plants as a single unit (R. 49–50, 441; 164–165, 168). Under three successive agreements between the Company and the Federation, covering the period from November 1934 to January 1937, the Company recognized the Federation as the bargaining representative of its members throughout the flat-glass division, including the comparatively small number of its members employed in the Crystal City plant (R. 50, 439–441; 79, 173–174, 275–321). A fourth collective agreement made on January 20, 1937, was, over the Federation's objection, limited to the five plants other than Crystal City (R. 50, 441; 83, 173–174).[4]

It is stipulated that the Federation represents a majority of all the production and maintenance employees at the six plants taken together, as well as a majority at each plant except Crystal City, where the evidence shows that approximately one-fourth of the employees are Federation members (R. 55, 443; 166, 190–191, 200). The Crystal City Union offered in evidence a petition, signed by over 1,300 of the 1,600 employees at the Crystal City plant, whom that organization claimed to

[4] While the Board made no express finding upon the matter, it is undisputed that, in accordance with its policy of maintaining uniformity in wages and other working conditions at all plants (see *supra*, p. 6), the Company put into effect at Crystal City, as well as at the other plants, a wage increase obtained by the Federation in the 1937 agreement (R. 236, 203, 175).

represent, stating their desire to have the Crystal City plant as a separate bargaining unit (R. 51, 46; 251–254). The Board found, however, that the Crystal City Union could no longer function as a labor organization, and that its membership and representation could not be considered as expressing the free choice of the employees (R. 50–51, 439); these findings were based upon the earlier order of the Board, entered in the first unfair labor practice case upon consent of the Company and enforced by the court below, requiring the Company to withdraw all recognition from the Crystal City Union as a bargaining representative of any of the Company's employees (pp. 3–4, *supra*).

The Board in the present unfair labor practice case reexamined its findings made in the representation case, that the production and maintenance employees of the Company at its six flat glass plants constituted an appropriate unit for collective bargaining and again determined, with one member of the Board dissenting, that the unit was appropriate (R. 438–444). The majority relied upon the similarity of wages and working conditions at all plants; the equalization of bargaining strength between the employees and the Company; and the previous history of collective bargaining (R. 443). The dissenting member felt that the Crystal City employees had in the past been viewed as a separate unit and should continue as such as long as they desired (R. 448–452).

Since it was not questioned that the Federation represented a majority of the employees in the unit found to be appropriate, the Board found that the Company's refusal to bargain collectively constituted unfair labor practices within the meaning of Section 8 (5) and (1) of the Act (R. 444–445). The Board's order (R. 447–448) requires the Company to cease and desist from these unfair labor practices, to bargain collectively, upon request, with the Federation as the exclusive representative of the employees at the six flat glass plants, and to post appropriate notices.

On September 22, 1939, the Company and the Crystal City Union filed in the Circuit Court of Appeals separate petitions to review and set aside the Board's order (R. 469–506, 507–517). The Board answered, requesting enforcement of its order against the Company (R. 527–530, 531–534, 535–536). On February 7, 1940, the Company and the Crystal City Union filed in the court below separate petitions for leave to adduce additional evidence (R. 536–540, 540–543). On July 23, 1940, the court below handed down its opinion (R. 545–552) and entered its decree (R. 552–553) denying the petitions to adduce additional evidence and enforcing the Board's order. Petitions for rehearing filed by the Company and the Crystal City Union (R. 553–567, 568–571) were denied on August 12, 1940 (R. 571-572).

SUMMARY OF ARGUMENT

I

A. Section 9 (b) of the Act provides that the Board shall decide "in order to insure to employees the full benefit of the right to self-organization and to collective bargaining" whether the appropriate bargaining unit shall be "the employer unit, craft unit, plant unit, or subdivision thereof." There is no question but that the Board's determination here was within the terms of the Act. Nor do petitioners challenge the relevance of the general *criteria* which the Board employed. The only question is whether the Board's order was arbitrary for want of any substantial evidence to support its findings.

B. The Board's ultimate finding, that a bargaining unit consisting of the employees at the Company's six flat glass plants is appropriate, was based upon subsidiary findings which also have received the concurrence of the court below. They are amply supported by the evidence: (1) The flat glass division is under centralized management and control by the divisional office at Pittsburgh. The Company's position at any bargaining conference would necessarily reflect a division-wide approach. Since wages and working conditions are substantially the same at all plants, effective bargaining and equality of bargaining power will be furthered if the employees have a division-wide representative. (2) The employees throughout the flat glass division have common interests; there is, ac-

cordingly, nothing inappropriate in the choice of a single representative. (3) A large majority of all the employees in the flat glass division desire a division-wide unit. (4) The history of collective bargaining in the flat glass division indicates that division-wide bargaining would be practicable and effective. The early collective agreements between the Company and the Federation covered all members of the Federation, in whatever plant they were located. The exclusion of the employees at the Crystal City plant from the last agreement reflects the formation of the Crystal City Union; even here, however, the wage increase won by the striking employees at the other plants was applied to the Crystal City plant.

C. The petitioners insist that the Board was required to disregard these factors and to give conclusive weight to the asserted preference of the Crystal City employees. (1) But this preference would not be determinative even if it were freely given. By definition, the preference of the minority must be ignored whenever a representative is chosen by the majority. Certainly, here, the equal bargaining power assured the majority, together with the minority, by a common representative should not be denied in order to meet the wishes of the minority. (2) In this case, however, the preference of the Crystal City employees could not be presumed to be freely given. In the prior unfair practice proceeding, the Company entered into a

stipulation with the Board that an order might be entered requiring it to cease and desist from dominating or interfering with the Crystal City Union, and requiring it to withdraw all recognition from that union. This order permanently incapacitated the Crystal City Union from representing the employees for the purposes of collective bargaining. The choice of the bargaining unit made as a result of the existence of the Company-dominated organization cannot be supposed to be a free choice.

II

The Board correctly excluded certain evidence offered at the hearing, and the court below properly denied the petitions of the Company and the Crystal City Union to adduce such evidence. (1) The evidence offered to show that the Company had not dominated and interfered with the Crystal City Union was properly excluded because the issue was concluded by the prior unfair practice proceeding. (2) The exclusion of evidence to prove that a majority of the Crystal City employees desired separate representation was not prejudicial, since the Board assumed for the purposes of its decision that this was the case. (3) The evidence offered by the Crystal City Union to show the separate interests of the Crystal City employees, while relevant in the representation proceedings, was properly rejected in the refusal-to-bargain proceedings, since there had been full opportunity in the representation case to offer this evidence.

III

The Act does not improperly delegate legislative power to the Board, and the standards governing the exercise of the Board's authority have been fairly applied.

ARGUMENT

I

THE BOARD'S FINDING THAT A UNIT CONSISTING OF THE EMPLOYEES AT THE COMPANY'S SIX FLAT GLASS PLANTS IS APPROPRIATE FOR PURPOSES OF COLLECTIVE BARGAINING IS SUPPORTED BY SUBSTANTIAL EVIDENCE

A. THE ISSUE

In this proceeding the Board was confronted with conflicting claims concerning the appropriateness of different collective bargaining units advanced by the interested parties. The Federation, representing a majority of all the employees affected, contended that a unit comprising the production and maintenance employees at all six of the Company's flat glass plants was appropriate; the Company and the Crystal City Union opposed this claim and urged that either the employees at each plant constituted a separate appropriate unit or that the Crystal City employees comprised one such unit and the employees at the other five plants made up another such unit (R. 48-49).

Section 9 (b) of the Act provides that:

> The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

Under this section the Board is required to decide in each case whether a claimed unit is or is not appropriate for purposes of collective bargaining, that is, whether it will "insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise * * * effectuate the policies of this Act * * *." There is no question here that the production and maintenance employees at the six flat glass plants constitute a subdivision of an employer unit, or that the determination of the Board is not within the terms of Section 9 (b).

The general *criteria* by which the Board determines the appropriate bargaining unit have succinctly been summarized by the Board:

> In determining whether the employees of one, several, or all plants of an employer, or the employees in all or only a part of a system of communications, transportation, or public utilities, constitute an appropriate unit for the purposes of collective bargaining, the Board has taken into consideration the following factors: (1) the his-

tory, extent, and type of organization of the employees; (2) the history of their collective bargaining, including any contracts; (3) the history, extent, and type of organization, and the collective bargaining, of employees of other employers in the same industry; (4) the relationship between any proposed unit or units and the employer's organization, management, and operation of his business, including the geographical location of the various plants or parts of the system; and (5) the skill, wages, working conditions, and work of the employees.[5]

This general administrative interpretation of Section 9 (b), adopted contemporaneously by the agency charged with the administration of the Act (see *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315), is not attacked by either petitioner.[6] They attack instead the application of these *criteria* to the facts of this case.

---

[5] *Fourth Annual Report of the National Labor Relations Board* (1939), 89–90. See also *First Annual Report of the National Labor Relations Board* (1936), pp. 112–120; *Second Annual Report of the National Labor Relations Board* (1937), pp. 122–140; *Third Annual Report of the National Labor Relations Board* (1938), pp. 136–197.

[6] The Smith bill (H. R. 1109, 77th Cong., 1st Sess.) provides in Section 9 (e) that separate elections should be held in each plant to determine whether the employees should be included in a multiple-plant bargaining unit. The majority report of the Special Committee to Investigate the National Labor Relations Board does not argue that in this regard the Board has misinterpreted Section 9 (b) of the Act. House Rpt. No. 3109, Pt. 1, 76th Cong., 3d Sess. See also the minority intermediate report, House Rpt. No. 1902, Pt. 2, 76th Cong., 3d Sess.

The Circuit Courts of Appeals have uniformly held that, like analogous determinations by the Board concerning the sufficiency of evidence or the propriety of certain affirmative relief,[7] the Board's determination concerning the appropriateness of a particular bargaining unit is conclusive unless it is arbitrary because not supported by evidence.[8] The matter, involving as it does

---

[7] *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, 208–209; *National Labor Relations Board* v. *Link-Belt Co.*, Nos. 235, 236, this Term, decided January 6, 1941; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265; *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 82.

[8] *Marlin-Rockwell Corp.* v. *National Labor Relations Board*, decided January 6, 1941 (C. C. A. 2d); *National Labor Relations Board* v. *Piqua Munising Wood Products Co.*, 109 F. (2d) 552, 554 (C. C. A. 6th); *National Labor Relations Board* v. *Lund*, 103 F. (2d) 815, 819 (C. C. A. 8th); *Bussmann Mfg. Co.* v. *National Labor Relations Board*, 111 F. (2d) 783, 785 (C. C. A. 8th); *National Labor Relations Board* v. *Carlisle Lumber Co.*, 94 F. (2d) 138, 143 (C. C. A. 9th), certiorari denied, 304 U. S. 575; *National Labor Relations Board* v. *Sunshine Mining Co.*, 110 F. (2d) 780, 789 (C. C. A. 9th), certiorari denied, No. 352, this Term; *International Association of Machinists* v. *National Labor Relations Board*, 110 F. (2d) 29, 46 (Ct. App. D. C.), affirmed, 311 U. S. 72. Compare *Brotherhood of Ry. Trainmen* v. *National Mediation Board*, 88 F. (2d) 757, 761 (App. D. C.); *Association of C. E. of A., T. & S. F. Ry. System* v. *Brotherhood of Ry. and S. S. Clerks*, 85 F. (2d) 152, 157 (C. C. A. 7th); *Nashville, C. & St. L. Ry.* v. *Ry. Employees' Dept.*, 93 F. (2d) 340, 342 (C. C. A. 6th), certiorari denied, 303 U. S. 649.

In four cases the courts of appeals have upheld, without discussion, multiple-plant bargaining units. *National Labor*

the application of specialized experience and expert knowledge concerning the processes of collective bargaining, is quite plainly one that should rest within the sound discretion of the administrative agency. Cf. *National Labor Relations Board* v. *Link-Belt Co.*, Nos. 235–236, this Term, decided January 6, 1941; *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 485; *Federal Trade Commission* v. *R. F. Keppel & Bro.*, 291 U. S. 304, 314.

The only question, then, is whether the determination of the Board was arbitrary, or an abuse of the discretion vested in it by the Act. This issue, in turn, reduces itself to the question whether there was any substantial evidence to support the findings and conclusion of the Board.

B. THERE IS ABUNDANT EVIDENCE TO SUPPORT THE DETERMINATION OF THE BOARD

In the present case the Board's ultimate finding, that a bargaining unit consisting of the production and maintenance employees at the Company's six flat-glass plants is appropriate, was based upon "the whole congeries of facts before the Board" (*National Labor Relations Board* v. *Link Belt Co.*,

---

Relations Board v. *Somerset Shoe Co.*, 111 F. (2d) 681 (C. C. A. 1st); *National Labor Relations Board* v. *Remington-Rand, Inc.*, 94 F. (2d) 862 (C. C. A. 2d), certiorari denied, 304 U. S. 576; *National Labor Relations Board* v. *Whittier Mills Co.*, 111 F. (2d) 474 (C. C. A. 5th); *McQuay-Norris Mfg. Co.* v. *National Labor Relations Board*, decided December 23, 1940 (C. C. A. 7th).

Nos. 235, 236, this Term, decided January 6, 1941) as set forth in the subsidiary findings. Since the court below concurred in the Board's findings, there is no occasion to review the evidence in detail. *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350, 357; *International Association of Machinists* v. *National Labor Relations Board,* 311 U S. 72, 75. It needs, in any event, only a brief summary of the various factors upon which the Board relied, and of the evidence supporting its findings, to show that its determination has ample support in the record.

1. *The greater effectiveness of employee bargaining through a division-wide representative.*— The Board found (R. 443, 51–52) that a unit consisting, with minor exceptions, of the employees at the Company's six flat glass plants would tend to equalize the employees' bargaining power with that of the company, a factor which is plainly of great weight under Section 9 (b).[9]

---

[9] The Company seems to complain that the Board considered the bargaining benefits to the employees in determining the appropriate unit (Br. 38–39). But Section 9 (b) expressly provides that the Board determine the appropriate unit "in order to insure to employees the full benefit of their right to self-organization and to collective bargaining". Compare Section 1 of the Act: "The inequality of bargaining power between employees * * * and employers * * * substantially burdens and affects the flow of commerce * * *." The Senate Committee stated that "the second major objective of the bill is to encourage * * * that equality of bargaining power which is a prerequisite to equality of opportunity and freedom of contract." Senate Rpt. No. 573, 74th Cong., 1st Sess., p. 3.

The flat glass division is under centralized management and control by the Company's divisional office at Pittsburgh (R. 74–75, 108–110, 123–124). The local plant superintendents have power to hire and fire, to settle grievances, and to recommend changes in wages (R. 89, 92, 112, 235). But the Company's decisions upon major labor policies rest with the divisional office, not with the plant superintendents; Vice-president Clause, in charge of the division, testified that that office would have to pass upon any collective agreement and that the wage rates applicable at all six plants were the same (R. 112, 236; and see *supra*, p. 6). The divisional office prescribes substantially identical conditions of wages and hours at all the plants (R. 82, 84, 96–97, 142). Any improvement in working conditions obtained as a result of collective bargaining at one or more plants is immediately put into effect at all of the other plants (R. 175, 203, 236).[10]

Under these circumstances, the Company's position at collective bargaining conferences would necessarily reflect a division-wide approach; the

[10] Wage increases obtained by the Federation after strikes in 1935 and 1937 were immediately applied by the Company not only to the plants where the Federation represented a majority of the employees but also to the Crystal City plant (R. 203, 236, 283). The Board found, from the nature of the Company's divisional operations, that "conditions at the Crystal City plant will almost inevitably be determined by conditions fixed for all the other plants * * *" (R. 443).

290637—41——4

response to a request for a wage increase at one plant would depend not upon the cost of such an increase at that plant but upon its cost as a division-wide increase. Similarly, the Company's bargaining strength is enhanced by the common management of the six plants; its ability, exercised during past disputes, to shift orders from strike-bound plants to those not affected (R. 75, 108–110, 123–124), is but one example of its bargaining advantages over a representative of employees whose representation is confined to a more narrow basis.[11]

The Board has held in a number of cases that where there is centralized employer control of labor policies and conditions at several plants, collective bargaining will be made more effective by a corresponding centralization of employee representation.[12] See *National Labor Relations Board* v.

---

[11] The device of shifting production from one plant to another in order to weaken the bargaining position of a labor organization is familiar to students of labor relations. See John R. Commons, *Labor and Administration* (1913), p. 80; Jeremiah W. Jenks and Walter E. Clark, *The Trust Problem* (1917), p. 187; Malcolm Kier, *Labor's Search for More* (1937), p. 88; U. S. Industrial Commission, *Preliminary Report on Trusts and Industrial Combinations*, Vol. 1, Review of Evidence, p. 31; Commission of Inquiry, Interchurch World Movement, *Report on the Steel Strike of 1919* (1920), pp. 177–178.

[12] *Matter of Rossie Velvet Co.*, 3 N. L. R. B. 804, 809; *Matter of American Hardware Corp.*, 4 N. L. R. B. 412, 417; *Matter of Todd Shipyards Corp.*, 5 N. L. R. B. 20, 35–36; *Matter of American Woolen Co.*, 5 N. L. R. B. 144, 147; *Matter of United Shipyards, Inc.*, 5 N. L. R. B. 742, 746–

Lund, 103 F. (2d) 815, 818 (C. C. A. 8th); *International Association of Machinists* v. *National Labor Relations Board*, 110 F. (2d) 29, 46 (App. D. C.), affirmed, 311 U. S. 72. It would seem clear, and petitioners do not deny, that where employer control is centralized the employees at a single plant can have but little bargaining power as compared with the employer. In the present case, for example, it is improbable that the Crystal City employees could, in view of the limited sanctions backing their request,[13] successfully shoulder the burden of obtaining improvements which would be applicable, under the Company's policy, to all the

---

747; *Matter of Standard Oil Co. of California*, 5 N. L. R. B. 750, 754; *Matter of Waggoner Refining Co., Inc., et al.*, 6 N. L. R. B. 731, 759–760; *Matter of Tennessee Electric Power Co.*, 7 N. L. R. B. 24, 32; *Matter of Fisher Body Corp.*, 7 N. L. R. B. 1083, 1088–1090; *Matter of Art Crayon Co., Inc.*, 7 N. L. R. B. 102, 116; *Matter of Royal Warehouse Corp.*, 8 N. L. R. B. 1218, 1221; *Matter of Postal Telegraph-Cable Corp. of N. Y.*, 9 N. L. R. B. 1060, 1068–1070; *Matter of Inland Steel Co.*, 9 N. L. R. B. 783, 787–788; *Matter of The Middle West Corp.*, 10 N. L. R. B. 618, 622; *Matter of Libbey-Owens-Ford Glass Co.*, 10 N. L. R. B. 1470, 1473–1476; *Matter of Nekoosa-Edwards Paper Co.*, 11 N. L. R. B. 446, 457–458; *Matter of Naumkeag Steam Cotton Co.*, 13 N. L. R. B. 513, 518; *Matter of Coos Bay Logging Co.*, 13 N. L. R. B. 950, 953; *Matter of Alpena Garment Co.*, 13 N. L. R. B. 720, 724.

[13] The generally weak position of the employees at a single plant in bargaining with an employer whose operations are far more extensive is emphasized here by the fact that the glass plant is the sole industry in Crystal City. Compare Paul H. Douglas, *Wage Theory and Wage Policy*, in *International Labor Review* (I. L. O., Geneva, March 1939), pp. 341–343.

plants. And the representatives of employees at different plants might work at cross purposes. On the other hand, centralized bargaining with a centralized management permits the employees to exert, in the interests of effective bargaining, the collective influence of all the employees in fact affected, and thus tends to equalize their bargaining strength with that of the employer.

2. *The common interests of the employees throughout the flat-glass division.*—The Board found (R. 443, 53) that the fact that wages, hours, and working conditions vary but little at any of the six plants (*supra*, p. 19), affords further evidence that a division-wide unit would better insure to the employees the full benefit of their rights of self-organization and collective bargaining. Were the interests of the employees at the various plants widely divergent, division-wide bargaining might result in confusion. When, however, because of an identity of skills and employment conditions, the interests of the employees at any one plant in the objects of collective bargaining are indistinguishable from those of the employees at any other plant, there is no doubt that the interests of all employees can effectively be presented by a single representative. And since the Company's policy precludes one plant group from gaining advantages not accorded to the others (*supra*, p. 19), the exclusion of any one plant from the bargaining unit would

simply mean that the working conditions there would necessarily depend upon the results of the bargaining concerning conditions at the other plants (R. 443).

3. *The desires of a large majority of all the employees in the flat glass division for the unit found by the Board.*—The Federation, which represents a large majority of all the employees working at the six plants (R. 190–191, 166), has at all times sought to organize and represent the employees on a division-wide basis (R. 191–194)[14] and in this proceeding requested the Board to find appropriate a unit composed of the employees at all six plants (R. 354B–355, 38A). The preference of a majority of all the employees affected, expressed through their representative, is plainly entitled to the consideration which the Board gave it (R. 443, 50–53). *International Association of Machinists* v. *National Labor Relations Board*, 110 F. (2d) 29, 46 (App. D. C.), affirmed, 311 U. S. 72; *National Labor Relations Board* v. *Biles-Coleman Lumber Co.*, 98 F. (2d) 18, 21 (C. C. A. 9th). Compare pages 29–32, *infra*.

---

[14] The form of self-organization is uniformly given consideration by the Board, especially where, as here, no *bona fide* rival union (*infra*, pp. 32–38) is contending for a different form of self-organization. See, *e. g.*, *Matter of Phelps Dodge Corp., United Verde Branch*, 6 N. L. R. B. 624, 632; *Matter of Nekoosa-Edwards Paper Co.*, 11 N. L. R. B. 446, 457; *Matter of Marcus Loew Booking Agency*, 3 N. L. R. B. 380, 384–385; *Matter of Boorum and Pease Co.*, 7 N. L. R. B. 486, 489.

4. *The history of collective bargaining in the flat glass division.*—This factor is uniformly given weight by the Board in determining the probable effectiveness of future bargaining on the basis of a unit claimed to be appropriate.[15] The Board found that the history of prior bargaining between the Company and representatives of its flat glass employees clearly establishes that division-wide bargaining would be practicable and effective (R. 439–440, 443, 49–50, 53).

The Company's first collective agreement with reference to its flat glass employees, dated November 13, 1934, was negotiated between the Federation and Vice-president Clause, the head of the divisional management at Pittsburgh (R. 78–79, 108). The agreement (R. 275–282) imposed upon the Company "the following rules and regulations in its relationship with its employees who are members of the Federation," without any limitation to employees at particular plants (R. 275–276). Clause testified without contradiction that the agreement applied to any members of the

---

[15] *Matter of Shell Oil Co. of California*, 2 N. L. R. B. 835, 844; *Matter of Remington Rand, Inc.*, 2 N. L. R. B. 626, 642–643; *Matter of American Steel Wire Co.*, 5 N. L. R. B. 871, 874–875; *Matter of Kling Factories*, 8 N. L. R. B. 1228, 1233–1234; *Matter of Bloedel-Donovan Lumber Mills*, 8 N. L. R. B. 230, 237; *Matter of Snoqualmie Falls Lumber Co.*, 10 N. L. R. B. 398, 402; *Matter of Monon Stone Co.*, 10 N. L. R. B. 64, 72; *Matter of Libbey-Owens-Ford Glass Co.*, 10 N. L. R. B. 1470, 1475; *Matter of Nekoosa-Edwards Paper Co.*, 11 N. L. R. B. 446, 457–458.

Federation at Crystal City (R. 79). The Company's present contention (Br. 27–28, 31) that the agreement applied only to Federation members working in plants where local unions had been formed, and therefore did not apply to members at the Crystal City plant, is contrary to the testimony of Clause. It is doubtless true that the machinery for the adjustment of individual grievances required the presence of a local union (see R. 276–279), but the Company's contention ignores the distinction drawn in the agreement between the adjustment of individual grievances and collective bargaining concerning general matters affecting all employees in the division. As to the latter matters, bargaining between the divisional management and the Federation, as representative of all its members at all of the plants, plainly was contemplated; the company agreed to "discuss at any time matters of mutual interest to the Company and those of our employees who are members of the Federation with such of the Federation's officers or committees as these employees may designate from time to time as their representative or representatives, always with the object of reaching a satisfactory understanding" (R. 276). This could only mean that the division-wide bargaining which had resulted in the agreement would be continued under the agreement. And the general protective provisions of the agreement (R. 276, 279–282) do not appear to be lim-

ited to plants where the Federation had formed a local union; on the contrary, they purport to lay down principles of labor policy applicable to members of the Federation at all the plants.

The significance of this agreement, in the Board's view, lay in the fact that the Company saw no necessity of separating the Federation members at any one of the six plants from the rest and dealing with them separately; it bargained with the Federation as the representative of all its members throughout the division and thus indicated that division-wide problems could be settled through such bargaining. The feasibility of such an approach was further established in the second agreement between the Company and the Federation, concluded in February 1935 (R. 282–289). A wage increase applicable to all the plants was provided (R. 283); through division-wide bargaining the employees had obtained an advantage which accrued to all of them. The third agreement concluded on November 26, 1935, likewise applied to Federation members at all the plants (R. 290–321, 173–174).[16]

---

[16] The Company appears to contend (Br. 29, 31), as the dissenting Board member thought (R. 451) that the omission of wage rates for the Crystal City plant from this contract indicates that the entire contract was inapplicable to members of the Federation at that plant. The major wage schedule is headed by a legend that it covers "Works Nos. 1–2–4–6–17–18–19"; a shorter schedule at the end covers "Works Nos. 10–11–12," (R. 302, 320). Crystal City—Works No. 9—is not mentioned. The Kokomo plant (Works No. 19), which is plainly not included in the agreement, is

Two significant occurrences took place between the date of the third agreement and January 1937, when the fourth agreement (R. 321–336) was concluded: the Crystal City Union was formed, and thereafter the Crystal City employees did not join in the strike called by the Federation in connection with the negotiations over the fourth contract, which strike was participated in by the employees at the other five plants (R. 124). At the Company's insistence, the Crystal City plant was excluded from the subsequent agreement, but the wage increase which the strike won for the employees was immediately put into effect at that plant as well as at the others (R. 168–169, 203, 236). Thus, despite the nominal limitation of the fourth agreement,

---

mentioned. We doubt that the legends carry any weight as to the scope of the agreement. Even though the Crystal City plant was not in terms covered by the wage schedules, the agreement itself expressly recognized the Federation as "the collective bargaining agency for those employees who are members thereof" (R. 290). The general protective and bargaining provisions of the agreement are not limited in application to members working at particular plants. It was reasonable for the majority of the Board to assume that if the contracting parties intended to take the new step of excluding from the contract members of the Federation employed at one of the plants to which the prior agreement had applied, they would have made that plain, as they did in the fourth agreement (*supra*, this page), instead of leaving the matter to remote inference from the possible omission of a wage schedule. The language of the contractual provisions (R. 290–301) is fully as broad as that of the first agreement (R. 275–276), which, as Vice president Clause testified (R. 79), applied to all Federation members in the division (*supra*, pp. 24–25).

the Company's bargaining plainly was still on a division-wide basis.

The past bargaining, then, which has repeatedly reached a successful conclusion in the execution of collective labor agreements, has consistently been on a division-wide basis, and always with the divisional management rather than with local plant officials. This affords weighty support for the Board's finding that a division-wide unit will promote effective collective bargaining.

The Company agrees that the history of collective bargaining is relevant (Br. 26, 27) but denies that it has in fact been on a division-wide basis (Br. 25–33). The Company, however, does not contest that the major labor problems were determined in the Pittsburgh office; that the wage increase of the second and fourth contracts were in fact extended to the Crystal City plant; or that division-wide bargaining is feasible. It insists only that the earlier agreements did not in fact include the employees at the Crystal City plant. This factual contention is contrary to the terms of the contracts and is contradicted by the testimony of Clause, who negotiated them on behalf of the Company (*supra*, pp. 24–25). Whatever might be its weight upon an independent examination, it cannot serve to show that the Board's specific findings concerning the scope of the agreements are without support in the evidence. Much less does it show that the broader findings as to the general bargaining history, or

the ultimate finding as to the appropriate bargaining unit, are arbitrary.

C. THE BOARD WAS NOT REQUIRED TO GIVE CONCLUSIVE WEIGHT TO THE ASSERTED PREFERENCE OF THE CRYSTAL CITY EMPLOYEES

The Company (Br. 41, 43, 44–48) and the Crystal City Union (Br. 13–15) contend, in effect, that the Board was required, under Section 9 (b) of the Act, to disregard the various factors upon which it relied, including the desires of a large majority of all the employees at the six plants, and to give conclusive weight to the asserted preference on the part of a majority of the Crystal City employees for a separate bargaining unit. Otherwise, it is said, the Crystal City employees are denied their statutory right to bargain collectively through representatives of their own choosing.

1. *The Preference Would not be Determinative Even if Freely Given.*—This reasoning begs the question at issue; as the Board stated in its decision, "the same can be said of the application of majority rule to any situation where a group of employees are not unanimous in their choice of representatives" (R. 442; see R. 549–550). The Act confers the right to choose bargaining representatives upon the majority of the employees in a unit found by the Board to be appropriate; a similar right is expressly denied to the minority in such a unit. The essence of petitioners' contention is that a minority in a unit claimed by the majority

to be appropriate has an absolute right to resolve in its own favor a conflict between the claim of the majority and its own contrary claim. If accepted, the contention would rest the power to determine appropriate units with particular minority groups of employees instead of, with the Board, in which the Act expressly vests the power.[17]

Manifestly, neither the majority of employees in the claimed division-wide unit nor the majority of employees in the claimed Crystal City unit could assert an unqualified right that their contradictory wishes be respected, to the exclusion of consideration of all other relevant circumstances.[18] The Board considered the desires of both majorities and concluded, upon the basis of the evidence we have

---

[17] The Company adopts a further approach which likewise begs the question. It apparently assumes, as a premise, that the Crystal City employees constitute "a separate industrial unit" which "has existed at Crystal City since 1870" and concludes therefrom that the Board's decision denies the "absolute right" of a majority of employees in "a unit" to select their own representatives (Br. 40–43; see R. 539, 542). The "absolute right," of course, is conferred only upon the majority of employees in a unit found to be appropriate, so that the assumed premise disposes of the entire question at issue and renders further argument unnecessary. The premise, we may note, is not justified by anything in the Act (*infra*, pp. 47–48) and would read out of Section 9 (b) the Board's power to find as the appropriate unit "the employer unit * * * or subdivision thereof."

[18] Section 9 (b) and its legislative history show plainly that the Board, in determining the appropriate bargaining unit, is not subject to any inflexible rule. Delimitation of the unit is "obviously for determination in each individual case." House Rpt. No. 1147, 74th Cong., 1st Sess., p. 22.

discussed, that to give effect to the wishes of the Crystal City employees "would inevitably hamper and obstruct the far larger number of the Company's employees at the other plants in their efforts to organize and to bargain collectively with the Company" (R. 51–52). Cf. *International Association of Machinists* v. *National Labor Relations Board*, 110 F. (2d) 29, 46 (App. D. C.), affirmed, 311 U. S. 72. If this and the other factors upon which the Board relied (*supra*, pp. 18–28) made reasonable its determination that the division-wide unit would best insure to all the employees the full benefits of collective bargaining, the desires of a minority of the employees in that unit cannot render the determination unreasonable or arbitrary.[19]

[19] The Company argues that under the so-called Globe Doctrine (first announced in *Matter of Globe Machine & Stamping Co.*, 3 N. L. R. B. 294) the determinative factor in resolving conflicts among groups of employees concerning the appropriate unit is "the desire of those affected" and that since the employees at the other five plants are already represented by the Federation, "the only employees affected by the order are those at Crystal City" (Br. 44). In the first place, the Globe Doctrine, propounded by the Board in the exercise of its administrative discretion, merely holds that the freely expressed desires of a majority of the employees in the less inclusive unit are ordinarily controlling. Here, there was no free expression of desire for a separate unit by a majority of the Crystal City employees (*infra*, pp. 32–38), so that an essential prerequisite to the operation of the Doctrine was lacking. (See Brief for the Board, *International Association of Machinists* v. *National Labor Relations Board*, No. 16, this Term, pp. 46–50). Moreover,

Even if the asserted desires of the Crystal City employees had been freely expressed, therefore, we submit that the Board could still validly reach the conclusion it did.

2. *The Preference of the Crystal City Employees Was Not Freely Given.*—In this case, however, the desires of the Crystal City employees could not be presumed to be uninfluenced by the employer; on the contrary, the Board could reasonably infer that the continued existence and functioning of the Crystal City Union constituted the principal basis for the desire of the Crystal City majority to set themselves apart from the others for bargaining purposes.

That organization is established to be company-dominated in violation of Section 8 (2) of the Act. In the first unfair-practice proceeding, initiated upon a complaint issued by the Board alleging such violations, the Company entered into a stipulation (R. 345–349) waiving further hearing and providing that the Board might issue an order requiring the Company to "cease

---

the considerations supporting the appropriateness of each of the two claimed units were far from evenly balanced, as the Board's findings and the evidence reveal (*supra*, pp. 18–28). In the second place, "the desire of those affected" must necessarily include all of the employees in the flat glass division; the principal basis for the Board's findings is that the collective bargaining rights of all of the employees would be disadvantageously affected by exclusion of the Crystal City employees from the bargaining unit (see *supra*, p. 31).

and desist from such unfair labor practices as have occurred in the past," to "cease and desist from in any manner dominating or interfering with the administration of the Crystal City Glass Workers' Union * * * or contributing aid or support to said organization" and "from recognizing or dealing with the Crystal City Glass Workers' Union as a labor organization," and, as affirmative action to effectuate the policies of the Act, to "withdraw all recognition from the Crystal City Glass Workers' Union * * * as a labor organization" (R. 347–348).[20] The Board issued an order (R. 350–352) in accordance with the stipulation, and the Circuit Court of Appeals entered a decree enforcing the order. *National Labor Relations Board* v. *Pittsburgh Plate Glass Co.*, 102 F. (2d) 1004 (C. C. A. 8). The effect of the order and decree was permanently to incapacitate the Crystal City Union from representing employees for purposes of collective bargaining with the Company and to bar it "from consideration as an employees' representative." *National Labor Re-*

[20] The Company's contention (Br. 33–37) that this order was not based upon illegal domination and support of the Crystal City Union ignores the terms of the stipulation and order, quoted above. The insistence that the absence of findings concerning domination and support prevents the order from having the effect it would have had if the Board had acted upon evidence instead of upon a stipulation of the parties, constitutes, in effect, a repudiation of the provision of the stipulation whereby the Company waived hearing upon the complaint (R. 347).

lations Board v. *Falk Corp.*, 308 U. S. 453, 461–462. The fact that the Crystal City Union was not a party to the proceedings did not invalidate the order or change its effect; the company was bound not to deal with that organization, thus rendering it ineligible to represent the company's employees in collective bargaining. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271; *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 361–365.[21]

---

[21] See, also, *Bethlehem Shipbuilding Corp.* v. *National Labor Relations Board*, 114 F. (2d) 930, 935 (C. C. A. 1); *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 873 (C. C. A. 2), certiorari denied, 304 U. S. 576; *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. (2d) 167, 173 (C. C. A. 3), certiorari denied, 308 U. S. 605; *Republic Steel Corporation* v. *National Labor Relations Board*, 107 F. (2d) 472, 477 (C. C. A. 3), modified on another point, 311 U. S. 7; *National Labor Relations Board* v. *J. Freezer & Son, Inc.*, 95 F. (2d) 840, 841–842 (C. C. A. 4); *National Labor Relations Board* v. *Wallace Manufacturing Co.*, 95 F. (2d) 818, 821 (C. C. A. 4); *National Labor Relations Board* v. *Christian Board of Publication*, 113 F. (2d) 678, 683 (C. C. A. 8); *National Labor Relations Board* v. *Ed. Friedrich, Inc.*, decided January 4, 1941 (C. C. A. 5); *Solvay Process Co.* v. *National Labor Relations Board*, decided January 4, 1941 (C. C. A. 5). The Crystal City Union did not seek leave to intervene in the company union case, although it must have known of the proceeding; as it recites in its brief (p. 4), the bargaining between it and the Company was halted when the charges of company domination were filed with the Board. The Crystal City Union's offer of proof at the hearing in the refusal-to-bargain case was to the same effect (R. 23).

A choice of representatives made while the continued existence of a company union interposes "a continuing obstacle" (*National Labor Relations Board* v. *Pacific Greyhound Lines*, 303 U. S. 272, 275) to freedom of choice, would not merit consideration as reflecting the employees' uncoerced desires. *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, 250; *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 461–463; *National Labor Relations Board* v. *Link Belt Co.*, Nos. 235, 236, this Term, decided January 6, 1941; *H. J. Heinz Co.* v. *National Labor Relations Board*, No. 73, this Term, decided January 6, 1941; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 236.[22] Nor can a choice of units made by employees under such circumstances be deemed a free choice, especially where, as in the present case, it is plainly made only as a result of the existence of the company-dominated organization.[23]

---

[22] See, also, *National Labor Relations Board* v. *Brown Paper Mill Co.*, 108 F. (2d) 867, 872 (C. C. A. 5), certiorari denied, 310 U. S. 651; *Bethlehem Shipbuilding Corp.* v. *National Labor Relations Board*, 114 F. (2d) 930, 938 (C. C. A. 1); *Westinghouse Electric & Manufacturing Co.* v. *National Labor Relations Board*, 112 F. (2d) 657, 660–661 (C. C. A. 2), certiorari granted, No. 447 this Term, November 12, 1940; *Republic Steel Corp.* v. *National Labor Relations Board*, 107 F. (2d) 472, 477 (C. C. A. 3), modified on another point, 311 U. S. 7.

[23] The Crystal City Union claimed a membership of approximately 1,300 of the 1,600 employees at the time of the

It may not be contended that the order of the Board requiring the Company to cease dominating and to withdraw recognition from the Crystal City Union, removed the restraints to which the Crystal City employees were subject and warranted a presumption that thereafter their choice as to the bargaining unit was a free choice. Their purported choice was bound up, not with a permissible selection of a new, undominated union limited in membership to employees at the Crystal City plant, but with the continued selection of an illegal organization that was permanently barred from acting as their representative. And the short period of time elapsing between the Board's order and the expression of the Crystal City employees' choice of a separate unit would preclude a contention that the employees had been "rendered entirely free to act upon their own initiative * * *." *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, 250.[24]

---

representation proceeding (R. 358, 46). The claim that the Crystal City employees desire a separate unit is based in part upon a petition received in evidence at the hearing in that case, expressing the signers' desire for a separate unit at Crystal City; that petition contained the signatures of some 1,334 Crystal City employees (R. 253–254, 51). The offers of proof concerning the desires of the Crystal City employees were plainly based upon those employees' membership in the Crystal City Union and their alleged selection of that organization as their bargaining representative (R. 249–250, 22–24, 26–31). See note 25, pp 37–38, *infra*.

[24] The order was issued on September 22, 1938 (R. 343), and the decree of the court enforcing it was entered on Jan-

In any event, it is plain that neither the Company nor the Crystal City Union has ever construed the order in such a way as to permit it to accomplish its intended purpose of restoring conditions permitting genuine freedom of choice at the Crystal City plant. Here, as in *H. J. Heinz Co.* v. *National Labor Relations Board*, No. 73, this Term, decided January 6, 1941, the Company has continued to recognize the Crystal City Union as a potential representative of the employees for purposes of bargaining with petitioner. The Company's position in this Court is that the Crystal City Union "had a perfect right to show that it was in fact a *bona fide* labor organization" (Br. 47). In the court below the Company made a motion to adduce evidence, *inter alia*, that the Crystal City employees had designated the Crystal City Union to act as their bargaining representative, that that organization had become an undominated organization, and that "the Crystal City Glass Workers Union has continued to be an active organization for the purposes for which it was chartered" (R. 537–538). The Crystal City Union's position here and in the court below are to the same effect (Br. 12–13, R. 541–542).[25]

---

uary 14, 1939 (102 F. (2d) 1004). The petition purporting to reflect the Crystal City employees' choice of units (note 23, pp. 35–36, *supra*) was offered into evidence during the hearing held on October 13 and 14, 1938 (R. 253).

[25] See, also, R. 478–479, 482, 488, 491–496. At the hearing before the Board the Company offered to prove that a majority of the Crystal City employees had designated that

Under these circumstances, there was plainly no "elimination of the [Crystal City Union] as a candidate" (*National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 460) which would serve to dissipate the effects of the Company's interference with and influence upon the form of the employees' self-organization for purposes of collective bargaining.

II

The Board Correctly Excluded Evidence Offered at the Hearing and the Court Below Properly Denied the Petitions to Adduce Such Evidence

The Company (Br. 44–48) and the Crystal City Union (Br. 7–9) contend that the rejection of certain offers of proof made by them at the hearings invalidates the Board's order and that the court below erred in denying petitions for leave to ad-

---

union "as their representative for collective bargaining" (R. 28), and in its exceptions to the trial examiner's report in the refusal to bargain case, the Company excepted to the examiner's rejection of both this offer (R. 403–407) and a similar offer (R. 23–24, 249–250) made on behalf of the Crystal City Union (R. 399–400, 387–388). The Company also excepted to the Board's finding that the Crystal City Union ceased to be able to function as a labor organization (R. 395). The Crystal City Union, besides objecting to these rulings (R. 412–413, 415, 420–422), moved that its name be included on the ballot in any election among the Company's employees to select a bargaining representative (R. 270). The Board denied this motion (R. 45). *Cf. National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 460–461.

duce such evidence. Briefly, the offers of proof were to the effect (1) that the Company had never dominated or interfered with the formation or administration of the Crystal City Union or contributed support to that organization; (2) that a large majority of the Crystal City employees are members of the Crystal City Union and desire it to be their bargaining representative and that the Company bargained with that organization on behalf of its members until charges of company-domination were filed with the Board; and (3) that the Crystal City employees have distinct interests from the employees at the other plants (R. 22–24, 26–31, 249–250).[26] The petitions in the court below sought to adduce substantially the same evidence that had been proffered at the hearings (R. 536–543).

1. *Company Domination and Interference.*—The issue of company domination of and interference with the Crystal City Union was concluded by the order of the Board in the prior unfair labor practice proceeding and by the decree enforcing that order (see pp. 32–34, *supra*). The examiner and the Board excluded the evidence on that basis (R. 20, 434; compare R. 50–51). As the court below held (R. 550–552), in the absence of any claim or

[26] The first two items of proof were offered by both petitioners; only the Crystal City Union offered the third item and its offer was not made at the hearing in the representation case but at the subsequent hearing in the refusal-to-bargain case (R. 23).

indication that the stipulation whereby the Company consented to the Crystal City Union's permanent disqualification as a representative of the Company's employees constituted a breach of faith or was otherwise invalid, the question could not be raised anew, and collaterally, in subsequent proceedings involving the Company's duty to bargain with the duly authorized representative of its employees.

2. *The Desires of the Crystal City Employees.*— The Board assumed, for purposes of its decision, that the facts proffered in the second item of proof were true (R. 434–435, 439; *cf.* R. 51–52). Consequently, no possible prejudice could result from the examiner's refusal to receive the evidence itself; if the evidence assumed by the Board to be true were sufficient to preclude the Board from concluding that the division-wide unit was appropriate, the Board's order must fall without introduction of the proof. Although the denial below of the petitions to adduce additional evidence was based on this ground (R. 550–552),[27] the only showing of prejudice which the Company seeks to make is through the assertion that "if the Board had considered the facts contained in the offer as true,

---

[27] See *National Labor Relations Board* v. *Dahlstrom Metallic Door Co.*, 112 F. (2d) 756, 758 (C. C. A. 2). Cf. *Clover Fork Coal Co.* v. *National Labor Relations Board*, 97 F. (2d) 331, 335 (C. C. A. 6); *Wilson & Co., Inc.*, v. *National Labor Relations Board*, 103 F. (2d) 243, 245 (C. C. A. 8); *National Labor Relations Board* v. *Ed Friedrich, Inc.*, decided January 4, 1941 (C. C. A. 5).

it could not have made findings contrary thereto" (Br. 48). But the Board expressly considered the evidence as true and clearly stated its reasons for deciding that the facts so proved were outweighed by other circumstances (*supra*, pp. 18–28).[28]

3. *The Separate Interests of the Crystal City Employees.*—Evidence that "the employees at the Crystal City plant have distinct interests from employees at other plants" of the Company (R. 23), offered by the Crystal City Union at the hearing in the refusal to bargain case, was concededly relevant upon the question of the appropriate unit (see pp. 22–23, *supra*). The offer was rejected upon the ground that full opportunity to present such evidence had been afforded at the

[28] The position of the Crystal City Union apparently is that no prejudice need be shown so long as the examiner failed to "inquire fully into the question of representation" (Br. 9). The contention, if accepted, would require full proof of facts assumed to be true and would place wholly unwarranted procedural burdens on the administrative process. Cf. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 351. Further, the Crystal City Union's principal offer of proof and the ruling to which it refers were made in the unfair labor practice case pursuant to Section 10 of the Act, not in the representation case under Section 9 (R. 23–24, 434–435, 439; see R. 249–250). In the unfair labor practice case, the regulation which the Crystal City Union invokes (Br. 9) was expressly inapplicable; there was no "question of representation" into which it was the examiner's duty to "inquire fully," although the earlier proceedings would, of course, be included in the record on review of the unfair labor practice case. See *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, 406, 409.

prior hearing in the representation case, in which the appropriate unit had been determined by the Board (R. 48–55), and that no reason was given why the proof was not offered at that proper time (R. 434–435; *cf.* R. 24).[29]

This ruling was not an abuse of the Board's discretion concerning the "mode of conducting trials, the order of introducing evidence, and the times when it is to be introduced." *Philadelphia & Trenton R. Co.* v. *Stimpson,* 14 Pet. 448, 463; *Cox* v. *Hart,* 145 U. S. 376, 380–381; *Fidelity & Deposit Co.* v. *Bucki & Son Lumber Co.,* 189 U. S. 135, 143; *Franklin* v. *South Carolina,* 218 U. S. 161, 168; *Hughes, Inc.* v. *Federal Trade Commission,* 77 F. (2d) 886, 887–888 (C. C. A. 2), certiorari denied, 296 U. S. 617. The evidence was relevant solely to the principal issue in the representation

[29] It further appeared that considerable evidence concerning the asserted distinct interests of the Crystal City employees had been introduced by the Company and the Crystal City Union at the hearing in the representation case. Thus it was shown that those employees are "farther removed from the influences of the City" (R. 93), are "largely native Americans" (R. 94), are "cut off from the outside world" (R. 95), are "very much higher in intelligence" than the employees at the other plants (R. 95, 147), are "thrifty people" (R. 147), have given rise to no serious labor difficulties for many years (R. 221, 148, 96), and have a "background of no outside unions" (R. 240–241). There was no showing that the Crystal City Union's general offer, at the later hearing, to prove that the Crystal City employees "have distinct interests" from the other employees (R. 23), embraced evidence of a different kind. For all that appeared, the offer might have contemplated further cumulative proof of facts already proved by uncontradicted evidence.

case; without it, the proof, including the testimony of the highest management official in the flat glass division, was entirely to the effect that the interests of the employees at all six plants in the objects of collective bargaining were identical (*supra*, pp. 22–23). The appropriate unit having been determined in the representation case, the unfair labor practice case was expressly (R. 38A, 35–36) and necessarily based upon that determination, as the Act contemplates. Section 10 (d); *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 459; *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, 406, 409. Since the issue had been adjudicated after proceedings in which the Crystal City Union had fully participated, including the offer of other evidence claimed to be relevant (R. 249–250), and since no reason was shown why the evidence (if different from that then adduced, *supra*, n. 29, p. 42) was not offered at a time when the issue was open, it was entirely proper for the Board to reject the offer of proof. A contrary ruling would have opened the entire issue tried in the representation case to retrial, the essence of disorderly administration of the Act.[30]

[30] At the opening of the hearing in the refusal-to-bargain case, counsel for the Crystal City Union expressly acquiesced in this statement by counsel for the Company: "I do not think it is our jurisdiction at this hearing to go in (*sic*) the fact of what is the appropriate unit, since I feel that the decision has already been rendered by the Board * * *" (R. 11)

For the same reason, the court did not err in denying the Crystal City's petition (R. 541) for leave to adduce evidence concerning the distinct nature of the Crystal City employees' interests. The burden was upon the Crystal City Union to establish to the satisfaction of the court that "there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency * * *." Section 10 (e). This burden was not sustained.[21]

III

The Act Does Not Improperly Delegate Legislative Power, and the Board Fairly Applied its Standards

1. The Company, while not abandoning the point, does not discuss the question raised in its petition for a writ of certiorari as to whether Section 9 (b) of the Act represents an unconstitutional delegation of legislative power to the Board. This is because counsel recognizes that inferences from decided cases indicate the validity of the Section (Br. 48). In the circumstances, it seems

---

[21] The statement (R. 542) in the petition that offers of proof concerning the distinct interests of the Crystal City employees had been made and rejected at the hearing in the representation case as well as at the hearing in the refusal-to-bargain case, was contrary to the record showing (R. 249–250) and to the ground upon which the Board rejected the evidence (R. 434–435). The Board pointed out these facts in its brief submitted to the court below. Brief for respondent, Nos. 449, 450, 451, October Term, 1939, C. C. A. 8, pp. 59–61.

sufficient to refer the Court to our discussion of this point at pages 13–14 of the Brief in Opposition.

2. The Company's further contention (Br. 48–49) that the standards governing exercise of the Board's authority have not been applied "objectively" in this case but pursuant to "a fixed purpose to reach a particular result," is an unsupported claim of a character which would scarcely be tolerated if made against a court. The attempt to establish administrative inconsistency amounting to caprice ignores important differences among the cases. We have shown that the Board consistently gives weight to the same factors (notes 12, 14, 15, pp. 20, 23, 24, *supra*). In none of the cases cited by the Company (Br. 50) were those factors present to the extent in which they obtain here.[22]

---

[22] In the *Ohio Foundry* case (3 N. L. R. B. 701) the enameling plant was viewed by the Board as a "separate business enterprise" from the two foundries, the work of the enameling employees required "different skill" from that of the foundry workers, and the form of self-organization and history of collective bargaining was upon the basis of separate plant units (3 N. L. R. B., at pp. 704–705); the mutual failure of the enameling employees and the foundry employees to participate in strikes called by the other group confirmed the diversity of interests already clear from the other circumstances (at p. 705). In the *Allied Laboratories* case (23 N. L. R. B., No. 14) the Board noted the absence of any history of collective bargaining at all and that there were material differences in the functions of the employees at the two plants (23 N. L. R. B., No. 14, pp. 4–5). In the *Model Blouse* case (15 N. L. R. B. 133) the Board pointed out that the labor organization contending for a multiple-

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Board's order is valid and that the decree below should be affirmed.

FRANCIS BIDDLE,
Solicitor General.

WARNER W. GARDNER,
Special Assistant to the Attorney General.

ROBERT B. WATTS,
General Counsel,

LAURENCE A. KNAPP,
Associate General Counsel,

MORTIMER B. WOLF,
OWSLEY VOSE,
Attorneys, National Labor Relations Board.

FEBRUARY 1941.

---

plant unit "has never attempted to bargain for the employees of these plants as one unit but has at all times treated the employees of each of these plants as a separate bargaining unit" (15 N. L. R. B., at p. 159); similarly, in the *Belmont Iron* case (9 N. L. R. B. 1202) the Board weighed the fact that "the history of organization on the part of both unions shows that they have never considered the employees in the three plants as constituting a single appropriate unit" (9 N. L. R. B., at p. 1205).

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Supp. V, sec. 151, *et seq.*) are as follows:

SEC. 8. It shall be an unfair labor practice for an employer—

* * * * *

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and other-

wise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony and proceedings set forth in such transcript.

U. S. GOVERNMENT PRINTING OFFICE: 1941